

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of estate of RAYMOND SULWIKOWSKI and FEDERAL AVIATION
ADMINISTRATION, JOHN F. KENNEDY AIRPORT, Jamaica, NY

*Docket No. 01-976; Submitted on the Record;
Issued April 23, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record and finds that the Office abused its discretion by denying further merit review.

On May 9, 1973 appellant, then a 41-year-old air traffic controller, filed a notice of traumatic injury claiming that his emotional condition was causally related to his federal employment. His claim was accepted for aggravation of chronic schizophrenia and wage-loss compensation for temporary disability was paid through April 21, 1982. Wage-loss compensation was suspended on April 22, 1982 due to appellant's failure to cooperate with the Office's vocational rehabilitation program. Appellant made no contact with the Office until July 29, 1990 when his benefits were reinstated. His wage-loss compensation continued until his death on June 29, 1991.

Appellant's estate has requested payment of the previously suspended compensation benefits for the period of April 22, 1982 to July 28, 1990. In an Office decision dated May 28, 1998, payment of retroactive compensation was denied on the basis that appellant failed to cooperate with the provisions set forth in 5 U.S.C. §§ 8113, 8104 and § 8128.

Appellant's estate requested reconsideration of the May 28, 1998 decision but the Office denied modification on August 24, 1999 but recognized that appellant "was incapable of handling his affairs ... [which] is good cause for not cooperating...."

By letter dated August 22, 2000, appellant's estate requested reconsideration. In support of the request, appellant's estate submitted an affidavit signed by Joe B. Whisler on August 22, 2000, the representative of appellant's estate, stating that he performed a search of Internal Revenue Service records and found that appellant filed no federal tax returns during the period in

question, April 22, 1982 to July 28, 1990. The Office had denied retroactive payment of compensation benefits since there was evidence of record that appellant had held various jobs during the period in question that were not reported to the Office. Appellant's estate, however, claims that appellant filed no federal tax returns during the period in question, indicating that he was not working full time, and also stating that if he had been working during that period, the income that he received was *de minimus* and should not be considered to be of any significance. In addition, appellant's estate claims that due to appellants acknowledged severe mental illness during the stated period, he was not able to file a claim form during his lifetime. Appellant had a history of chronic schizophrenia with paranoid features, alcoholism and left inguinal hernia.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ Because more than one year has elapsed between the issuance of the Office's August 24, 1999 merit decision and February 21, 2001, the date appellant's estate filed the appeal with the Board, the Board lacks jurisdiction to review the August 24, 1999 decision and any preceding decisions. Therefore, the only decision before the Board is the Office's November 17, 2000 nonmerit decision denying appellant's application for a review of its August 24, 1999 decision.

Section 8128(a) of the Federal Employees' Compensation Act² does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation. Section 8128(a) of the Act, which pertains to review, vests the Office with the discretionary authority to determine whether it will review a claim following issuance of a final Office decision. The Office through regulations, has placed limitations on the exercise of that discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶

In this case, appellant's representative submitted new and relevant evidence not previously considered by the Office. In an affidavit signed by the representative of appellant's

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.606.

⁵ 20 C.F.R. § 10.607.

⁶ 20 C.F.R. § 10.608.

estate, the representative stated that appellant did not have a job during the period in question, and if he did have any type of income during this period, the income was *de minimis* in nature and insignificant. Appellant's representative also stated that appellant should receive retroactive compensation benefits for the period in question due to the serious nature of his mental illness during the period, noting that he was unable to file a claim form during his lifetime. This evidence submitted by appellant's representative is relevant to the underlying issue in this case, as it addresses appellant's lack of earnings during the period in question. The Board notes that it is not appellant's entitlement to compensation during the forgiven period that is at issue, but rather the amount due during this period. Even if appellant had held odd jobs during the period, he may also have been entitled to compensation since the Office had found good cause for not cooperating during the period due to his incapacity. It is also the Office's burden, not appellant's, to establish that appellant did have earnings during the period in order to reduce his compensation to anything less than total disability. As the affidavit submitted by appellant's representative addresses appellant's earnings during the period in question, it is directly relevant and appellant is entitled to a merit review.⁷

The November 17, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed and remanded for a merit review.

Dated, Washington, DC
April 23, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The Board notes that the Office may want to research Social Security records regarding appellant's employment during this period, as these types of records are more readily available to the Office than to appellant.